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No. 138

IN THE

Supreme Court of the United States

GREAT NORTHERN RAILWAY COMPANY, a corporation,

Petitioner,

vs.

GALBREATH CATTLE COMPANY, and ANNICE W. PHELPS and FRANCES P. BELDEN, as Executrices, and EUGENE PHELPS, as Executor of the Last Will and Testament of L. G. PHELPS, deceased,

Respondents.

BRIEF OF PETITIONER

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BRIEF OF PETITIONER

INTRODUCTORY STATEMENT.

This case formerly appeared in this Court as Cause No. 29581 (R. 261 to 295, 306) on a Writ of Certiorari to review a judgment of the Supreme Court of the State of Montana (R. 265 to 276, 306), affirming the jurisdiction of the Trial Court but granting a new trial unless the plaintiff would consent to a reduction of $1020.00 in a judgment of the Trial Court (R. 18 to 19) which was entered upon a verdict of a jury (R. 18) awarding the plaintiffs compensation in the sum of $20,685.90 for damages claimed to have been sustained to 984 head of cattle in transit from Cody, Wyoming, on the Railway of the Chicago, Burlington & Quincy Railroad

Company to Seville, Montana, on the railway of the Great Northern Railway Company, the terminal carrier, which was the sole defendant in the Trial Court.

The case as formerly presented, after certiorari was granted (262 U. S. 740; 43 S. C. 702; 67 L. ed. 1209) was dismissed (264 U. S. 571; 44 S. C. 334; 68 L. ed. 855) on the ground that the judgment of the Supreme Court of the state was not a final judgment, and that, therefore, the proceedings in certiorari were premature, and certiorari would not lie until the case had been remanded to the Trial Court and a new trial had, or a new judgment entered and a second appeal taken to the Supreme Court of the state, whose judgment would then, for the first time, become a final judgment.

Accordingly, further proceedings were had in the Trial Court, and, upon the mandate from the Supreme Court of the state reaching the Trial Court, the plaintiffs elected to abide by the modification of the judgment (R. 297), and a new judgment was accordingly entered in favor of the plaintiffs and against the defendant in the reduced sum (R. 296 to 297). The defendant then at once appealed (R. 298) from this judgment, and the hearing was expedited and the cause advanced (R. 299 to 306). But the Supreme Court of the state thereupon dismissed this appeal (R. 307 to 308) on the ground that its former decision was controlling, thereby under the statutes of Montana (R. C. 1921, Sec. 9748) affirming the judgment.

Accordingly the cause then being in condition to be reviewed, and all further suggested steps in the state court having been taken as directed, nevertheless, to

avoid any further question of practice as to the Court to which the writ should run, the railway company, defendant below, petitioner here, petitioned for a writ of certiorari to run to the Trial Court if its judgment was the final judgment of the highest court of the state where a decision could be had, and to run to the Supreme Court of the state to review its judgment dismissing the appeal, if, under the statutes of Montana, that was the final judgment of the highest court of the state. The writ was thereupon granted (R. 312; ..... U. S. .....; 45 S. C. 94; 69 L. ed. 34).

REFERENCE TO THE OFFICIAL REPORT OF THE OPINIONS DELIVERED IN THE COURTS BELOW.

Only the decisions of the Supreme Court of Montana are officially reported. The following constitutes, therefore, a full reference to the opinions of the Supreme Court of Montana and of the Supreme Court of the United States giving the history of this case to date, to-wit:

1. Decision of the Supreme Court of Montana on first appeal: Phelps et al. vs. Great Northern Railway Company, 66 Mont. 198, 213 Pac. 610.

2. Decision of Supreme Court of the United States granting a Writ of Certiorari to review the first judgment of the State Supreme Court: Great Northern Railway Company vs. Galbreath Cattle Company et al., 262 U. S. 740; 43 S. C. 702; 67 L. ed. 1209.

3. Decision of Supreme Court of the United States dismissing this Writ of Certiorari as premature: Great Northern Railway Company vs. Galbreath Cattle Company et al., 264 U. S. 571; 44 S. C. 334; 68 L. ed. 855.

4. Decision of the Supreme Court of the State on the

second appeal: Phelps et al. vs. Great Northern Railway Company, 71 Mont. .....; 227 P. 65.

5. Decision of the Supreme Court of the United States granting this second Writ of Certiorari: Great Northern Railway Company vs. Galbreath Cattle Company et al., ... U. S. .....; 45 S. C. 94; 69 L. ed. 34.

DATE OF JUDGMENT TO BE REVIEWED WITH REFERENCE TO RECORD.

The judgment of the Supreme Court of Montana is dated June 21, 1924, dismissing the appeal. See the opinion of the Court (R. 307) and the minute entry thereof (R. 307).

The judgment of the Trial Court is dated May 15, 1924 (R. 296 to 298). The writ of certiorari was thus timely applied for, whichever judgment is to be reviewed.

CLAIMS ADVANCED AND RULINGS MADE AND RELIED UPON AS THE BASIS OF THIS COURT'S JURISDICTION.

Three matters are submitted in this proceeding: The first **(1)** question to be presented will be the error in the State Court's upholding (R. 8 to 9; 266 to 269, 296 to 297, 307 to 308) its jurisdiction notwithstanding the same had been brought to an end by a petition filed by the defendant for a removal of the case to the United States Court (R. 5 to 8) on the ground of diversity of citizenship, and on the ground that the case arose under the Act to regulate interstate commerce. This is the subject of Specification of Errors I.

The next two questions relate to the denial of other

Federal rights in the form of fundamental errors in instructions given and refused, such as **(2)** the failure properly to instruct the jury as to the person upon whom rested the burden of caring for the animals in transit (Specifications II-a to e), this involving the instructions erroneously given (R. 245 to 247, 258) and, indeed, conceded by the Court to have been erroneously given (R. 270 to 273), and instructions refused (R. 256 to 257), which again the Court conceded should have been given (R. 273); and **(3)** the failure properly to instruct the jury (Specifications III-a and b) as to the Federal rule as to the burden of proof where the shipper's caretaker accompanies the stock and is in charge thereof (R. 243 to 245); but the Supreme Court of the State held (R. 275) that a Montana rule would control.

STATUTORY PROVISIONS SUSTAINING JURISDICTION.

The above statement itself shows that this Court's jurisdiction is clear; nevertheless reference is here made to Section 237 of the Judicial Code, subdivision b, defining jurisdiction to review judgments of state courts, and showing certiorari to be the proper remedy.

A reference to other sections relates to jurisdiction of the subject matter. Thus Sec. 28 relates to jurisdiction on removal and incorporates, by reference, Sec. 24, including subdivision "eighth" thereof, as to original jurisdiction of district courts. Sec. 51 defines merely venue. All of these sections relate to the removal feature.

As regards jurisdiction over the other questions, the carrier's duties as to interstate shipments are found in

the acts regulating commerce, and especially in Comp. Stats. 1918, Sec. 8651 and Comp. Stats. Sec 8604-a.

CASES SUSTAINING SUCH JURISDICTION.

Complying with the rules, it may be said that a whole host of cases, almost from the beginning, of course sustain the right to review a judgment of a state court where the question of the right of removal is raised.

See B. & O. R. Co. vs. Koontz,
104 U. S. 5; 26 L. ed. 643,

and other cases cited in the brief of the argument.

The error in the instructions in effect relieving the shipper from the duty to care for the animals in transit involves the statute of the United States above cited, commonly called the 28-hour law. Its meaning is clear, but apparently it was drawn in question. In any event defendant's claim of a right thereunder to be exonerated under certain circumstances from the duty of caring for the animals was a Federal right specially set up and claimed, and, as regards the error in the burden of proof, the following authorities show that this is not a matter of local pleading or practice, but this being an interstate shipment is governed by Federal law, and other authorities appear in the brief of the argument:

Adams Express Co. vs. Croninger,
226 U. S. 491, 57 L. ed. 314, 33 S. C. 148;
Central Vermont R. Co. vs. White,
238 U. S. 507, 59 L. ed. 1433, 35 S. C. 865.

A.

STATEMENT OF THE CASE

I.

DENIAL OF RIGHT OF REMOVAL TO UNITED STATES COURT.

As to the first of these questions, your petitioner, as stated, duly filed in the Trial Court a petition for the removal of the case to the United States District Court for Montana (Tr. p. 6 to 8), on the double ground that the complaint (T. p. 1 to 5) showed that the case arose under the laws of the United States and, indeed, being a case to recover alleged damage to cattle in an interstate shipment, it arose under the Federal laws regulating commerce (R. p. 6 l. 12 to 24; p. 7 l. 14 to 31) and, secondly, on the ground that it arose between citizens of different states, in that the defendant was a Minnesota citizen and one of the plaintiffs was a Wyoming citizen and the other plaintiff was a Montana citizen (R. p. 6 l. 12 to 37). THE TRIAL COURT expressly found that the right of removal was properly preserved, but RULED THAT THE CASE DID NOT ARISE UNDER THE COMMERCE LAWS AND THAT THERE WAS NOT SUFFICIENT DIVERSITY OF CITIZENSHIP, AS A MATTER OF VENUE, FOR THE SUIT TO BE ORIGINALLY BROUGHT IN THE FEDERAL COURT AND, THEREFORE, THE TRIAL COURT DENIED REMOVAL (R. 8.). THE SUPREME COURT overruled defendant's exception and sustained the denial of the right of removal, and

DECLINED TO FOLLOW THE CONTROLLING DECISIONS OF THE SUPREME COURT OF THE UNITED STATES in General Investment Company vs. Lake Shore and Mich. S. Ry. Co., *infra*, and in Lee vs. Ches. & O. Ry. Co., *infra*, AND HELD THAT THESE DECISIONS were not controlling or applicable and DID NOT AFFECT other decisions such as SMITH vs. LYONS, *infra*, and CAMP vs. GRESS, *infra*, AND THAT, therefore, THE VENUE PROVISIONS, of the Federal laws, DEFINING ORIGINAL JURISDICTION so-called, STILL CONTROL JURISDICTION ON REMOVAL, contrary to the clear and express declarations of the said recent controlling decisions of this Court. Said Supreme Court also ruled that this cause did not arise under the commerce laws of the United States (R. p. 267, bottom, to p. 269, top), thereby declining to follow other decisions of this Court hereafter cited. A WRIT OF CERTIORARI WAS, THEREFORE, NECESSARY TO SECURE FOR DEFENDANT THIS FEDERAL RIGHT OF REMOVAL WHICH HAS BEEN DENIED TO IT IN THE VERY FACE OF THESE CONTROLLING DECISIONS.

II.

DENIAL OF OTHER FEDERAL RIGHTS.

It is somewhat unsatisfactory to present as a ground of reversal a single procedural question. But here the procedural question goes to jurisdiction and in addition there are presented two additional grounds of reversal

showing how, in other respects, the defendant below has been unjustly deprived of further federal rights.

Thus, in the first place, there was

1.

A Denial of a Duty on the Shipper to Unload, Feed, Water and Rest Cattle in an Interstate Shipment and Placing this Duty on the Carrier, Contrary to the Federal Statute.

The Trial Court, in the settlement of the instructions to the jury, refused Defendant's requested Instructions Nos. 27 and 27A (R. 256 and 257), giving effect to the statutes of the United States (Sec. 8651, Com. Stat. 1918), and the provisions of the interstate bill of lading (R. 262 to 264), admitted to have governed this interstate shipment, whereby the duties connected with the unloading and caring for the animals in transit were assumed by the shipper. The requested instructions, imposing this general duty of caring for the animals in transit on the caretaker as specifically required by the shipping contract, are set out verbatim in Specifications IIA and IIC in this brief. But the Court refused these requested instructions and sustained plaintiff's objection thereto that "there was a default on the part of the shipper and that the Act of Congress (?) required the carrier to properly unload and feed the animals in the event that the shipper did not, and on the ground (?) that the defendant was assisting in unloading." R. 256 to 257; Specifications IIB and IID in this brief.)

The Supreme Court, concerning the refusal to give these instructions, said (R. p. 273 l. 27 to 32):

> "The duties imposed on plaintiffs under this contract were not called to the attention of the jury by any instruction given by the Court, as they should have been. The offered instructions were directed to that specific subject and should have been given. The Court's refusal to give them was error."

THE SUPREME COURT OF MONTANA, in its judgment, thus HOLDS THAT IT WAS ERROR TO REFUSE THESE REQUESTED INSTRUCTIONS (R. l. 14 to 32) concerning a vital matter in the cause reasonably exerting a controlling influence on the jury. (See testimony: Original Exhibit 1; R. 21 to 25; 26 to 30; 34 to 38; 40 to 48; 51 to 52; 59 to 63; 75 to 78; 79 to 85; 89 to 91; 98 to 102; 103 to 112; 113 to 114; 118 to 124; 125 to 130; 130 to 136; 139 to 143; 143 to 146; 146 to 149; 154 to 159; 169 to 172; 218 to 238,) AND THEREBY RULED IN FAVOR OF THE FEDERAL RIGHT CLAIMED BY YOUR PETITIONER AS DEFENDANT BUT THE SUPREME COURT, after ruling that the trial Court denied defendant a Federal right and after upholding the Federal right, DECLINED TO GIVE EFFECT TO THIS FEDERAL RIGHT FOR, instead of reversing the judgment so grounded upon this denial of a Federal right, THE COURT UPHOLDS THE JUDGMENT SO ERRONEOUSLY GROUNDED NOTWITHSTANDING THIS ERROR. The Supreme Court in effect, thus denies the Federal right.

The Trial Court, refusing defendant's said requested

instructions correctly stated the law, in fact, in Instruction No. 8 (R. 247, 258) instructed the jury as follows:

> "You are instructed that if you find from the evidence in this case that the defendant in this case undertook and did unload the cattle at Great Falls, Montana, for the purpose of feeding, watering and caring for the same, and that plaintiff's compensated the defendant for the feeding thereof, then it was the duty of the defendant to unload the cattle in a humane manner into pens properly equipped for rest, water and feeding and while the cattle were so unloaded it was the duty of the defendant to properly feed and water the same during the time the cattle were at Great Falls, Montana."

The Supreme Court says that, "the giving of this instruction was error," because not warranted by the evidence and, in any event, in other respects, it was error to give it. (R. 270 to 273.)

Then the Court, in its decision declining to reverse the judgment, brushes this error aside practically without comment and thereby deprives the defendant of the right which it had to have the jury correctly instructed, as regards the duty of caring for the animals in transit. It is idle for the Court correctly to interpret the Federal Law in favor of the defendant if, when the jury is erroneously instructed on that law and the defendant therefore prejudiced, no relief is to be given.

The Supreme Court says (R. 275 to 276) that, if the matter of unloading and feeding in transit is eliminated from the case, the other errors may be disregarded and the case of liability for the 142 head that died in the brief transit was fully tried under fairly proper instructions. In this respect the Court overlooks that the un-

loading, feeding and watering at Great Falls was strongly stressed in the evidence as a cause of the death of 142 head and by plaintiffs as a cause of some $30,000 additional claimed depreciation in the balance of the herd.

BY WHAT RIGHT DOES THE COURT ELIMINATE THE MATTER OF THE UNLOADING AND FEEDING AT GREAT FALLS AND THE CLAIMED DEPRECIATION IN THE BALANCE? THE COURT DOES NOT AND COULD NOT SAY THAT THESE THINGS AND THE ADMITTED ERRORS IN THE INSTRUCTIONS ON THIS DID NOT AFFECT THE JURY, and the verdict of the jury is several thousand dollars in excess of the maximum amount claimed by plaintiff by reason of the death of the 142 head, as to which number alone the Court says the case was properly tried.

To show how unwarranted was this action of the State Court it is necessary for us to briefly condense the testimony.

REVIEW OF TESTIMONY

We cite in the main plaintiff's testimony, but here it should be borne in mind that defendant's testimony may also be considered because a conflict requires reversal if the jury was not properly instructed on that conflict.

(*1.*)

THE MAIN DAMAGE WAS DUE TO IMPROPER CARE IN TRANSIT.

The shipment consisted of 984 head, of which 519 were three year old cattle, and the balance yearling

steers (R. 55, 67). IT WAS UNDISPUTED THAT WHEN THE ANIMALS WERE UNLOADED AT GREAT FALLS IN TRANSIT THERE WERE ONLY 9 DEAD AND 86 DOWN, AND THESE WERE LIMITED TO 3 YEAR OLD CATTLE. Defendant's Exhibit 14 (R. 155 to 157) a list made out as each car was unloaded, showed that, of eleven cars loaded with only yearling cattle, there were no cattle down and none dead. The remaining 21 cars were loaded with 3 year old cattle, with the exception that seven of these cars each had one yearling with the older cattle (R. 156 to 157).

The President of the Cattle Company (R. 64) testified that later, after unloading, in addition to the 9 dead at the time of unloading, 133 more died, making the total dead 142. It was extraordinary, therefore, that the astonishingly heavy loss should occur in such a short transit, and there must have been some peculiar reason for all of the 142 dead cattle being 3 year old cattle except two.

The plaintiffs claimed that the damage was due to the animals becoming overheated by a delay at the time the cattle were received by the Great Northern at the Junction at Mossmain, from eleven o'clock at night to five o'clock in the morning, awaiting connection, and by one hour's delay in transit at Armington near Great Falls, awaiting opposing trains. Defendant claimed the loss was mainly due to a failure to give the animals proper care at Great Falls.

(2.)

DEFENDANT GAVE MANY REASONS WHY THIS WAS TRUE, DUE TO A FAILURE TO DISCHARGE THE DUTY OF CARING FOR THE CATTLE AT GREAT FALLS.

The defendant showed that the animals had been practically off water, as far as any conscious effort to water them was concerned, for about 24 hours before loading at Cody was completed and, therefore, for more than 48 hours before unloading. This was undisputed (R. 27 to

28; 40 to 41; 43 to 46; 125 to 127; 119 to 130; 39 to 48; 128 to 129), except plaintiffs denied that the animals would be thirsty. After watering at Cody only the day before loading, the 3 year olds were grazed on "salt sage" (R. 27; 121 to 124; 126 to 127), it being admitted that this sage would increase the need for water (R. 121; 100 to 101; 195), though it was disputed whether it would be inherently injurious. Moreover the animals were not loaded in the cool of the early morning. The older cattle were separated from the younger cattle, preliminary to loading, in the heat of the day with the thermometer at 90 degrees, and they were also loaded first and remained packed in the cars for about 4 hours in the hot dusty atmosphere of the loading corrals (R. 27 to 28; 47 to 48; 121 to 122; 128; 47). The three year old animals were also heavier loaded, being loaded to a minimum of 26,000 pounds to the car, and the yearlings to a maximum of 16,000 lbs. (R. 46; 157; 90 to 91; 122; 119; 220 to 222; 224 to 225; 226 to 229.)

(3.)

ACTS OF THE CARETAKER AT GREAT FALLS AS A CAUSE OF THE DAMAGE.

The defendant contended that vastly the greater part of the damage was due to the failure of the caretaker in handling the animals at Great Falls, overheated as they then were partly by reason of the foregoing conditions. The three year old animals required special care as to water. On arriving at Great Falls, the Shipper unloaded the animals because of their condition, assisted by section laborers. But at that time, the gravest results had not been exhibited. There were but nine dead and the later deaths were largely due to him.

Thus the caretaker testified for the plaintiffs, that the railroad company sent a veterinary to assist him in handling the situation the next day after the unloading had been completed, in caring for the animals and while

they were resting there (R. 37). This veterinary cautioned him, the caretaker distinctly recalled, to go easy in watering the animals and not to give them too much to drink, but the damage had already been done, for the caretaker testified that, upon arrival, when the animals would be unloaded, each car would be unloaded into a pen with water and the animals were very thirsty and would "make" for the water with a rush (R. 37; 113 to 114). The caretaker recognized that the trainmen and sectionmen were merely assisting him and were not expert cattle men, but were there only to carry out his instructions (R. 25; 37 to 38; 40), yet he gave them no instructions, where instructions were necessary, and exercised no care in cautioning them, except in minor particulars and his supervision was admittedly neglectful. In the matter of watering the animals, on which he was later cautioned by the veterinary, he exercised no prohibiting supervision, but acquiesced in, and took part in, what was done and, though he interfered with the men and exercised an active supervision in unloading, he allowed each car to be unloaded into the pens, in the ordinary way, with water and gave the animals all the water they could get (R. 38; 24 to 25; 35 to 40; 113 to 114).

Indeed, at that time, far from keeping the animals off from large quantities of water, and instead of giving it to them slowly, he complained that the troughs were leaking so that the animals did not have an opportunity at once to take on a big fill from a full trough. The cattle were so thirsty that on hearing the water running in the troughs they would rush for it piling over each other to drink (R. 24; 39 to 40; 113 to 114).

The action of the caretaker was condemned by all. He was an inexperienced college student at the time, never having had any previous experience in handling cattle. He protested at the time of loading against being sent out with such a responsibility (R. 22, bottom; 26, 28, bottom, to 29, top).

The witness Carney testified for the plaintiffs that he saw the cattle being unloaded into the pens with water,

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and the stronger were crowding the weaker ones and trampling them down. He saw a young fellow around there representing the shipper and Carney added "It is true that I did feel that if he were supervising the attention that should be given to the cattle while unloading, or whoever was supervising, was not supervising correctly." The testimony of this witness was practically limited to his account of what he considered a rather shameful neglect on the part of whoever was charged with the duty of supervising and is found on pages 113 to 114 of the transcript.

The plaintiffs contended that, as bills were tendered by the defendant to the plaintiffs for feed furnished to the animals (R. 69 to 70), any duty in connection with watering and feeding the animals rested upon the defendant (R. 247). But these bills were merely for the price of the feed, not for labor.

The following references to the transcript, showing the presence of the caretaker and his neglect, set forth only the plaintiff's testimony and not the defendant's testimony in part in accord with, and part in opposition thereto: (R. 25) "We finished unloading the 19th." (R. 25; R. 35 to p. 38) "A veterinarian that the railroad company had sent to me to assist me in handling the situation." (R. 37) "In the process of unloading I had only the assistance of the trainmen and section crew." (R. 38) "The crew that was working there and assisting was in charge of a foreman for the company. They were in charge of the section foreman," (R. 40; 112 to 114; 35.)

Defendant's testimony was to the same effect. (R. 149 to 159.)

(2.)

IMPOSING BURDEN OF PROOF ON CARRIER WHERE SHIPPER ACCOMPANIES STOCK.

The Trial Court placed the burden of proof in this action upon the carrier (R. 245, Specification of Errors

III A and B in this brief) notwithstanding this was an interstate shipment and the shipper's caretaker accompanied the shipment, whereas, under the Federal law, the burden, under such circumstances, would be on the shipper. The Supreme Court upheld this action of the Trial Court on the ground that the interstate character of this shipment was defeated by this being an action against the terminal carrier, and hence it was held that the exceptional Montana rule (Nelson v. G. N. Ry. Co., 28 Mont. 297; 72 Pac. 642) on the burden of proof applied (R. 268, 275). Thereby the Supreme Court denied defendant, as a terminal carrier in an interstate shipment moving under a bill of lading issued by the initial carrier, a Federal right.

B.

SPECIFICATION OF ERRORS

I.

It was error in the Court to deny Defendant's Petition for the Removal of the Cause to the Federal Court (Tr. p. 5 to 9).

II-A.

It was error in the Court to refuse Defendant's Requested Instruction No. 27 as follows: (R. 256.)

You are instructed that under the law the obligation to unload and reload the cattle in transportation rested upon the shippers and not upon the railway company and that therefore the railroad company is not under any obligation to furnish for the purpose of unloading or reloading the cattle in question expert help in that regard

and that plaintiffs cannot complain in this action because the men who assisted in the unloading and reloading were not expert cattle men.

II-B.

It was error in the Court to sustain the following objection to Defendant's Offered Instruction No. 27, to-wit (R. 256):

That is objected to because under the law the railroad company is obliged to unload and care for the cattle in default of the shipper doing that, and this instruction would be inconsistent with the instruction given by the Court at the request of the plaintiffs. This being an interstate shipment they are bound by the Act of Congress which requires the company to unload and feed the cattle in the event that the shipper does not, and in this case the defendant did furnish feed and charged the same to the plaintiff.

II-C.

It was error in the Court to refuse Defendant's Requested Instruction No. 27-a as follows (R. 257):

You are instructed that aside from doing the actual details of the unloading, loading or care of the cattle in transit, the duty of supervising said unloading, loading and care rested primarily upon the plaintiffs and their agents and they cannot recover for damages, if any, caused by negligence, if any, on their part in not properly supervising said unloading, loading or care (aside from doing the actual details of the same) or to which their said negligence, if any, contributed as a cause.

II-D.

It was error in the Court to sustain the following objections to the Defendant's Requested Instruction No. 27-a to-wit (R. 257):

That is objected to because inconsistent with instructions given at the request of plaintiff and for the reason that there is no evidence to predicate the instruction upon, and for the further reason that as appears from the evidence the defendant, without any particular request upon the part of the plaintiff's agent, caretaker, began to assist in the unloading. There is no evidence tending to show any supervision on the part of the caretaker, and for the further reason that the defendant company was obliged to unload the cattle, and for the further reason that there is no evidence whatever to show that there was any damage of any character whatsoever from the caretaker participating in the unloading.

II-E.

It was error in the Court to give Plaintiff's Requested Instruction No. 8, the same appearing as Court's Instruction No. 8 (R. 245 to 247; 258) as follows:

You are instructed that if you find from the evidence in this case that the defendant in this case undertook and did unload the cattle at Great Falls, Montana, for the purpose of feeding, watering and caring for the same, and that plaintiffs compensated the defendant for the feeding thereof, then it was the duty of the defendant to unload the cattle in a humane manner into pens properly equipped for rest, water and feeding and while the cattle were so unloaded it was the duty of the defendant to properly feed and water the same during the time the cattle were at Great Falls, Montana.

II-F.

It was error in the Court to overrule the following objections to Plaintiffs' Requested Instruction No. 8, same appearing as Court's Instruction No. 8 (R. 245 to 247):

The defendant objects to that on the ground that it is an erroneous statement of the evidence, and the proof

does not show that the defendant undertook to unload or did unload the cattle, but that the defendant's employees merely assisted the caretaker in his duty to attend to the matter of unloading, watering, feeding and caring for the animals, and that bills were not tendered to the plaintiffs or paid by the plaintiffs for any work done by defendant's employees in the premises in assisting the caretaker. The bills were merely bills for feed which the defendant procured for the shipper. Under the law it is not the duty of the defendant to unload the cattle or to properly feed or water the same, or take care of them while they are in the feed yards at Great Falls, but on the contrary this is a duty resting upon the shipper and his caretaker.

Further under this instruction, though an incompetent caretaker was sent in charge of the shipment and the employees of the defendant assisted him in discharging his duty to unload the animals, and the animals were damaged by reason of his failure to instruct them as to how they should unload the animals, or how they should be rested, or how they shoud be cared for, or the animals were injured by reason of his failure to give directions as regards feed, the defendant would be held liable though it was not in fact negligent. Under the law railroad employees are not expert cattle men and the caretaker is supposed to be, and the duty of determining what should be done and of seeing to it that the animals are properly unloaded and cared for rests upon the shipper and not upon the railway company. The caretaker is here on the ground, and this instruction as framed would make the railway company liable even if he was on the ground and directing what should be done, or they were assuming that in the absence of direction by him that they were doing the right thing.

III-A.

It was error in the Court to give its Instruction No. 3, being Plaintiff's Offered Instruction No. 3, as follows (R. 243):

You are instructed that the burden of proof is on the defendant to show negligence, if any, on the part of the plaintiff's caretaker who was in charge of said cattle, in respect to the manner of looking after the same while being transported by the defendant.

III-B.

It was error in the Court to give its Instruction No. 5, the same being Plaintiff's Requested Instruction No. 5, as follows (R. 243 to 245):

You are instructed that if you find the cattle in question were delivered to the defendant in good condition for transportation and are injured during transportation and there is no evidence to show that the animals were injured from an inherent want of vitality, or by reason of injuries inflicted on each other, or by unavoidable accident, the carrier has the burden of proving that the injuries other than the alleged beating of said cattle were occasioned by some other cause than its own negligence, though the shipper accompanies the shipment.

C.

BRIEF OF THE ARGUMENT

The brief of the argument will follow the outline of the statement of the case and will cover (1) the denial of the right of removal, (2) the error in the instructions defining the duty to care for the animals in transit, and (3) the error in the instructions on the burden of proof.

I.

DENIAL OF REMOVAL TO FEDERAL COURT.

As the right of removal was seasonably urged, all fur-

ther proceedings were without jurisdiction and void:

B. & O. R. Co. vs. Koontz,
104 U. S. 5; 26 L. Ed. 643;
Gordon vs. Longest,
10 L. Ed. 900; 41 U. S. 97;
Goldey vs. Morning News,
156 U. S. 518; 16 Sup. Ct. 509; 39 L. Ed. 517;
Kanouse vs. Martin,
14 L. Ed. 660; 56 U. S. 198;
National Steamship Co. vs. Tugman,
106 U. S. 118; 1 Sup. Ca. 58; 27 L. Ed. 87;
Powers vs. Chesapeake & O. R. Co.,
169 U. S. 92; 42 L. Ed. 673; 18 Sup. Ct. 264;
Kern vs. Hindekoper,
103 U. S. 485; 26 L. Ed. 354;
Home Life Insurance Co. vs. Dunn,
22 L. Ed. 68; 86 U. S. 214;
Marshall vs. Holmes,
141 U. S. 589; 12 Sup. Ct. 62; 35 L. Ed. 870.

Though the entire record is voluminous, the pertinent portions on the removal feature are involved in a few pages. This would include the complaint (R. 1 to 5) and the removal proceedings (R. 5 to 9).

1.

A SUMMARY DISCUSSION OF THIS MATTER.

As the action arose against a terminal carrier in interstate commerce, the suit arose under the Act to regulate commerce.

Adams Express Co. vs. Croninger,
226 U. S. 491;
57 L. Ed. 314; 33 Sup. Ct. 148;
Kansas City So. Ry. Co. vs. Carl,
33 Sup. Ct. 391; 227 U. S. 639;
57 L. Ed. 683;

M. K. & T. Ry. Co. vs. Ward,
61 L. Ed. 1213;
37 Sup. Ct. 617; 244 U. S. 383.

Moreover, as the defendant was a citizen of Minnesota and the plaintiffs citizens of states other than Minnesota (Montana and Wyoming), the Federal Courts would have jurisdiction over the subject matter of this suit as one arising under this Federal law and on the ground of diversity of citizenship, and the case could be removed to the District Court for Montana irrespective of any venue provision of the Federal statutes concerning venue of suits originally to be brought in a Federal Court.

General Investment Co. vs. Lake Shore & M. S. Ry Co., 260 U. S. 261;
43 Sup. Ct. 105; 67 L. Ed. 244;
Lee vs Ches. & O. Ry. Company,
260 U. S. 653; 43 Sup. Ct. 230;
67 L. Ed. 443.

These decisions would be controlling and would dispense with any necessity of prolonging this brief further on this point. But, now, three times (in the brief before the Montana Supreme Court, in the objections there filed to a petition for a rehearing, and in the objections recently filed in this Court to the granting of a Writ of Certiorari) the plaintiffs have argued and cited authorities to the effect that this cause does not arise under any law of the United States and that the original venue provisions control removal proceedings also. Moreover, plaintiffs have carried the State Appellate Court with them. A proper respect for the State Appellate Court and a courtesy to opposing counsel seems, therefore, to justify enlarging the brief and setting the matter out

more fully in the hope that quotations from cases and references to pages will effectually foreclose plaintiffs' unfounded arguments being repeated here a fourth time, or, if repeated, plaintiffs will undoubtedly feel it necessary to make some reply to quotations from decisions of this Court.

For these reasons there follows here:

(2)

A MORE DETAILED TEDIOUS CONDENSED ARGUMENT ON THE RIGHT OF REMOVAL.

First, as regards the case arising under the Commerce Laws:

The complaint showed an attempt to collect some $45,000 damages sustained to cattle in transit from Cody, Wyoming, on the Burlington Railroad, through the junction with the railroad of the Great Northern, your Petitioner, at Mossmain, Montana, to Seville, Montana, the action being brought against the terminal carrier over whose line it is alleged the damage occurred. The plaintiffs' argument that the interstate nature of the shipment or any reliance on any Federal law did not appear in the complaint itself comes with poor grace, as the complaint alleged that the Burlington issued a through bill of lading on which the shipment was moved (R. Par. IV, 2), and a new livestock contract issued by the Great Northern at Mossmain was excluded, when offered in evidence, on the ground that the original contract referred to in the complaint, necessarily completely controlled the entire movement (R. 31 to 34; 242), and the complaint charged confinement in cars, and a 36-hour release governed the movement (R. 34), and the plaintiffs also obtained a ruling that the interstate char-

acter of the action made void the limitation of value provided in the contract (R. 247 to 248).

As the shipment originated in Wyoming and was destined to Montana, though the terminal carrier movement was wholly in Montana, the liability was controlled by the Federal Interstate Commerce Law, which made the original contract controlling to destination, and imposed the duties and liabilities of the 28-hour law regarding unloading and resting and made void the limitation as to value, and otherwise, except as modified by other Federal statutes or by the shipping contract, adopted the common law as the Federal law defining the measure of duty and liability. The following authorities show that such a suit arises under the laws of the United States:

Adams Express Co. vs. Croninger,
226 U. S. 491; 57 L. Ed. 314; 33 Sup. Ct. 148;
Kas. City So. Ry. Co. vs. Carl,
33 Sup. Ct. 391; 227 U. S. 639; 57 L. Ed. 683;
G. F. & A. R. Co. vs. Blish Milling Co.,
241 U S. 190; 60 L. Ed. 948; 36 Sup. Ct. 541;
C. & N. W. Ry. Co. vs. Whitnack Co.,
42 Sup. Ct. 328; 258 U. S. 369; 66 L. Ed. 665;
O. W. R. & N. Co. vs McGinn,
42 Sup. Ct. 332; 258 U. S. 409; 66 L. Ed. 689;
M. K. & T. Ry. Co. vs. Ward,
37 Sup. Ct. 617; 244 U. S. 383; 61 L. Ed. 1213;
Penn. Ry. Co. vs. Olivit,
37 Sup. Ct. 468; 243 U. S. 574; 61 L. Ed. 908;
C. & W. C. R. Co. vs. Varnville Furn. Co.,
237 U. S. 577; 59 L. Ed. 1137; 35 Sup. Ct. 715.

When it is said that an action against the terminal carrier arises at common law and not under a Federal law, it is overlooked that the Federal law defines the liability of all of the carriers in an interstate shipment; on all it imposes certain restrictions and duties by statute and increases the liability of the initial carrier beyond its own line and adopts the common law, except as modified by the 28-hour law, the shipping contract, and

other provisions of the Interstate Commerce Act, as the measure of liability of the terminal carrier. This makes the common law on this subject a part of the Federal law adopted by reference.

From the Croninger case, supra, the following is quoted:

> "One illustration would be a right to a remedy against a succeeding carrier, in preference to proceeding against the primary carrier, for a loss or damage incurred upon the line of the former. The liability of such succeeding carrier in the route would be that imposed by this statute, and for which the first carrier might have been made liable."

From the Carl case, supra, the following is quoted:

> "The liability of any carrier in the route over which the articles were routed, for loss or damage, is that imposed by the act as measured by the original contract of shipment so far as it is valid under the act."

Though the Supreme Court of the State was hurried into the error of citing only two *nisi prius* decisions in opposition apparently to the decisions of the tribunal of last resort, surely plaintiffs will not (as in the objections to the granting of a Writ of Certiorari) again cite these cases or ignore the express quotations just given.

As the case arose under the Federal law, and, indeed, under the Commerce laws, jurisdiction was conferred, as asserted in Petition for Removal, by the 8th subdivision of Section 991 of the Compiled Statutes, and removal was proper to the Federal Court of Montana irrespective of the venue provisions regarding suits originally brought in the Federal Court. The case of

> General Investment Co. vs. Lake Shore & M. S. Ry. Co., 43 Sup. Ct. 106; 260 U. S. 261; 67 L. Ed. 244,

is controlling.

But the Supreme Court ignored this decision, in its original opinion, on the ground that that case arose

under the Federal law, but that the present case did not, and the Court declined to heed the language of the General Investment case, which was applicable to all removal cases, distinguishing venue from jurisdiction.

(*b.*)

However, diversity of citizenship was also urged as a ground of removal and hence, after the argument, to escape this threatened distinction being urged further, the case of

> Lee vs. Ches. & O Ry. Co., 260 U. S. 653; 43 Sup. Ct. 230; 67 L. Ed. 443,

was cited to the Court, but this case too was not heeded and, when pressed upon the Court in the Petition for Rehearing, the Court amended its opinion by adding a paragraph that these two cases did not overrule

> Smith vs. Lyon, 133 U. S. 315; 33 L. Ed. 635; 10 Sup. Ct. Rep. 303;
>
> Camp vs. Gress, 250 U. S. 308; 63 L. Ed. 997; 39 Sup. Ct. Rep. 478.

The cases of Smith vs. Lyons and Camp vs. Gress are, however, cases originally brought in a Federal court, and it is held that the venue provisions in regard to suits originally brought require that jurisdiction (not as regards the subject matter of the suit, but as a matter of venue or personal privilege) shall be denied unless all of the parties plaintiff, or all of the parties defendant, upon whose residence in a district the venue depends, are residents of that district. This related to jurisdiction as a matter of venue, not jurisdiction of the subject matter.

The old provision of the law was that, as regards the subject matter of suits to be brought in Federal courts, that is, as regards suits based on diverse citizenship, the suit must be between a citizen of the state where suit is brought and a citizen of another state. This was not a provision relating to venue, but one relating to jurisdiction of the subject matter; it limited jurisdiction over the subject matter of suits based on diversity of citizenship, to suits between citizens of the state where suit was brought and citizens of other states. This provision has been repealed. But in Smith vs. Lyon, the Court was

called on to consider the venue provisions of the law, the provisions requiring suit to be brought in the district of the residence of the plaintiff or of the defendant. In determining the meaning of the singular word "plaintiff" or "defendant," in these venue provisions, the Court held it included the plural and construed the venue provisions as requiring residence in the district by all plaintiffs or by all defendants. In reaching this conclusion the Court clearly shows that it is considering jurisdiction so-called by way of venue and not jurisdiction of the subject matter, and the Court, merely by way of analogy, states that, ever since the decision in Strawbridge vs. Curtiss (7 U. S. 267; 2 L. Ed. 435), the similarly phrased provisions (in the singular number) of the old statute, relating to jurisdiction of the subject matter and confining diverse citizenship cases to cases of "suits between a citizen of the state where the suit is brought and a citizen of another state," had been construed as requiring all of the parties on one side to be citizens of the state where the suit was brought.

Now, Smith vs. Lyon expressly calls attention to the fact that this provision restricting jurisdiction of the subject matter had been repealed, but the Court held that the previous authorities on this statutory provision concerning jurisdiction of the subject matter were controlling, by way of analogy, in construing the somewhat similarly worded provisions of the statute concerning venue of suits originally brought in the Federal Court.

Again, in Camp vs. Gress, the Court expressly calls attention to the repeal of this old provision regarding jurisdiction of the subject matter, and expressly says that the Act of 1887-8 (and the Judicial Code) "did not restrict jurisdiction based on diversity of citizenship in those cases where the venue is determined by the residence of the plaintiff." And the Court distinctly says that where the parties are citizens of different states the Federal court has jurisdiction and the remaining question is not one of jurisdiction, but of venue and, again, in construing provisions expressly held to relate merely to venue regarding original suits, the Court cites with

approval Smith vs. Lyons, saying that that case merely applied to the venue provisions the rule of the Strawbridge case construing former provisions concerning actual jurisdiction as distinguished from venue which were "similar in language and analogous in subject matter."

In both of these cases it is clear that the Court is considering not jurisdiction of the subject matter, but solely venue rights of parties as regards suits originally brought in the Federal courts, which rights the parties may waive, and the question as to whether there was a waiver was argued in these cases. As they concern only venue of suits originally brought, they are not in point at all on the question of jurisdiction on removal.

Of course, as stated by the Supreme Court of Montana, the General Investment case and the Lee case do not affect the cases of Smith vs. Lyon or Camp vs. Gress, for the two latter cases concern only venue in cases originally brought in Federal court, while the two former concern only venue in cases to be removed from State courts, and, under these two recent decisions, it is held that venue as to original proceedings has nothing to do with venue on removal. Moreover, THE SUPREME COURT OF THE STATE, in ruling that the two former cases are not controlling, HAS NOT HEEDED THE EXPRESS STATEMENT IN THE GENERAL INVESTMENT CASE (43 Sup. Ct. 106 at 112, 1st paragraph) THAT THE DECISION IN CAMP vs. GRESS WAS BASED ON THIS VERY DISTINCTION.

The cases of

Tenn. vs. Bank, 152 U. S. 454; 14 Sup. Ct. 654;
Mexican National Bank vs. Davidson, 157 U. S. 201; 15 Sup. Ct. 563;
Cochran vs. Montgomery Co., 199 U. S. 260; 26 Sup. Ct. 58,

cited by the Supreme Court of the State, to the effect that a case to be removable must be one which could have originally been brought in a Federal court, are not in point, as these cases all relate to jurisdiction of the subject matter and not to venue.

Here again, after the citation of the General Investment Company case and of the Lee case, plaintiffs have twice (once in answer to the petition for a rehearing in the State Court, and here in opposition to a Writ of Certiorari) urged attention to these decisions. To avoid their being further pressed, attention may with propriety be called to the fact that THE SUPREME COURT OF THE STATE, IN CITING THESE DECISIONS (and counsel for the plaintiffs in pressing these decisions) HAS NOT HEEDED THE EXPRESS STATEMENT OF THIS COURT IN THE GENERAL INVESTMENT CASE (43 Sup. Ct. 106 at 114, 1st paragraph) TO THE EFFECT THAT THESE CASES ARE NOT IN POINT.

As the defendant here was a Minnesota citizen, and the plaintiffs were citizens of states other than Minnesota (Wyoming and Montana), there was jurisdiction of the subject matter of this suit as a controversy between citizens of different states, and this suit could have originally been brought in any Federal court, subject to a personal privilege in a defendant to object to the venue, but this would relate to venue in original proceedings and would have nothing to do with removal, the venue of which, on removal, would be the Federal court of the State where the suit was brought.

How, or why, the Lee and General Investment cases are not in point, or are not controlling, or how escape can be had from the cases beginning with Adams Exp. Co. vs. Croninger, or how, or why, the cases cited by the State Appellate Court, at plaintiffs' instance, are in point, has never been made to appear.

II.

DUTY TO CARE FOR THE ANIMALS IN TRANSIT.

It has been shown that the Trial Court refused defendant's requested instructions Nos. 27 and 27-A, imposing

the general duty of caring for the animals in transit on the caretaker as required by the contract, and sustained the plaintiffs' objection that "there was a default on the part of the shipper and that the Act of Congress required the carrier to properly unload and feed the animals, in the event that the shipper did not, and on the ground that the defendant was assisting in unloading."

The defendant's requested instructions merely gave effect to the Federal statute.

Comp. St. 1918, Sec. 8651.

That these requested instructions correctly stated the law is shown by the following decisions:

A. T. & S. F. Ry. Co. vs. Merchants Livestock Co.,
273 Fed. 130;
Penn. R. Co. vs. Swift & Company,
258 Fed. 289;
Webster vs. U. Pac. Ry. Co.,
200 Fed. 597 at 599;
Starr vs. C. B. & Q. R. Co.,
173 N. W. 682;
Fluckinger vs. Chic. & N. W. Ry. Co.,
154 N. W. 865;
So. Ry. Co. vs. Tollerson,
68 S. E. 798.

Indeed, the decision of the Supreme Court of Montana may be cited in support of this error, for the Court says:

"The duties imposed on plaintiffs under this contract were not called to the attention of the jury by any instruction given by the Court, as they should have been. The offered instructions were directed to that specific subject and should have been given. The Court's refusal to give them was error."

The Court's decision thus amounts merely to a statement that though the refusal to give these instructions

was error and the error was doubled because of error in the instructions given on the subject, this was apparently harmless error, because, in the Court's opinion, the unloading and care of the animals at Great Falls did not contribute to the damage.

But the Court has no right arbitrarily so to rule, for, up to the time of the close of the plaintiffs' case there was no question, in the actual admissions of the plaintiff's testimony, that the work of unloading, caring for and reloading the animals at Great Falls, was in charge of the shipper's caretaker, and no dispute existed that all of the duties of the care in this particular rested upon the shipper to determine what should be done and to supervise the hands that were admitted to be merely assisting him. But, with this testimony manifesting such neglect in supervision, the plaintiffs appreciated the seriousness of the case if the jury were permitted to consider the palpable cause of the plaintiffs' damage as a neglect of a duty resting upon the shipper and hence it was that, in the settlement of instructions, the plaintiffs changed front and urged literally that the caretaker's failure was so great as to amount to a default by the shipper and hence, that the duty fell upon the carrier to make good this default, and these objections were sustained.

IT IS CLEAR THAT IT WAS DEFENDANT'S CONTENTION, SUSTAINED BY THE PROOF, THAT A great deal of fatal damage had not occurred when the animals were unloaded at Great Falls, and IT WAS THE CARE OF THE ANIMALS IN GREAT FALLS AND THE SUDDEN ADMISSION OF THE

ANIMALS TO WATER THAT CAUSED THE DEATHS AND whatever additional damage was caused. Possibly there may have been a play for judgment either way in this particular, BUT THE CASE WAS SUBMITTED TO THE JURY ON THE BASIS THAT ANY MISTREATMENT AT GREAT FALLS, IN THE MATTER OF UNLOADING AND WATERING AND FEEDING THEM WAS A VIOLATION OF DUTY BY THE DEFENDANT, AND NOT A VIOLATION OF DUTY BY THE SHIPPER. THE JUDGMENT MAY FAIRLY BE CONSIDERED AS GROUNDED ON THE ERRORS IN THESE INSTRUCTIONS. These errors could not possibly be harmless.

We have shown the federal right especially claimed by the petitioner and that the Supreme Court of the State recognized the validity of the claim and then denied it, as a matter of procedure, under a declaration apparently that its denial did not affect the result, though how or why it did not affect the result is not stated.

Under the Federal decisions, however, if it is clear that when a Federal right is specifically set up and claimed, the Federal Court will not allow the State Court, under the guise of mere procedure, to deny the Federal right.

Atlantic Coast Line R. Co. vs. Burnette,
36 Sup. Ct. 75, 239, U. S. 199; 60 L. Ed. 226;
Ward vs. Love County,
253 U. S. 17; 64 L. Ed. 75; 40 Sup. Ct. 419.

III.

ERRORS ON BURDEN OF PROOF.

In this case we need not really consider upon whom

rests the burden of proving negligence. The issue is a simple one as to whether, where the shipper accompanies the stock and is in charge thereof, is the burden of proof on him or on the carrier either as to negligence or to trace *the cause of damage* to some act or omission of the carrier. The animals are admitted to have become sick in transit. They were over-heated and the question is whether the deaths were due to any over-heating due to defendant's negligence, or were the deaths due to sickness caused by over-heating, or to sickness caused by the act of the shipper in handling them at Great Falls, and especially in admitting the animals too quickly to too much water while over-heated. Bear in mind that the animals were in the charge of the shipper all the time and, as fas as the claim for depreciation in the living animals is concerned, the animals were, for five days, taken away by the shipper from the railroad premises and exclusively in the custody of the shipper.

There is some little diversity of authority in the State decisions as to whether the burden of proof is on the carrier as to peculiar railroad matters, that is to say, to show that it was not negligent (10 Corpus Juris p. 379, Sec. 581). Where the issue is negligence and damage and its cause, following sickness, that is to say, damage and what acts or omissions (negligent or otherwise and by whomsoever done) caused the damage, the rule is stated in

10 Corpus Juris p. 380, as follows:

"*Sickness of livestock:* An important limitation on the foregoing principles, recognized by some decisions and perfectly sound in principle, is that where a recov-

ery is sought for the sickness of live stock in transit, or from death resulting from sickness, the burden is on plaintiff to prove the carrier's negligence."

Indeed, though there is some slight conflict in the state decisions, the great weight of authority is to the effect that, where the shipper accompanies a shipment of live-stock, the burden of proof is on the shipper all along the line, that is to say, the burden of proof is then on the shipper to show (a) the damage sustained by the stock in transit and (b) what acts or omissions of the defendant caused this damage and (c) that these acts or omissions of the defendant were negligent. Where as is claimed here, there might be damage caused by acts of the shipper and by acts of the defendant, it might more correctly be said that the burden of proof was on the shipper to show (a) the entire damage sustained by the animals; (b) what acts or omissions caused the damage; (c) if some of these acts or omissions of the shipper, what part of the damage was caused by acts or omissions of the shipper and what part by acts or omissions of the carrier, and (d) that these acts or omissions of the carrier were negligent.

Thus from

10 Corpus Juris p. 381 and 382

we quote:

"Where Owner assumes Care of Stock During Transportation aa. Burden of Showing Negligence of Carrier. Although there is some authority to the contrary, the general rule is that, where by special agreement the owner of stock or his agent accompanies the shipment for the purpose of giving care and attention to stock, the burden is on the owner, in an action for damages for loss or injury alleged to be

due to the negligence of the carrier, to prove that the loss or injury was the result of the carrier's negligence."

In the note to this text many cases are cited, from which we select the following:

Lane vs. Oregon Short Line R. Co.,
198 Pac. 671 (Ida.);
Zimmerman vs. Northern Pacific Ry. Co.,
167 N. W. 546 (Minn.);
Starr vs. C. B. & Q. R. Co.,
103 Neb. 645; 173 N. W. 682 at 683;
Bartelt vs. Ore. R. & N. Co.,
57 Wash. 16; 106 Pac 487 at 488;
135 Am. S. R. 959;
St. Louis & S. F. R. Co. vs. Wells,
81 Ark. 469, 99 S. W. 534 at 536;
Terre Haute & L. R. Co. vs. Sherwood,
132 Ind. 129; 31 N. E. 781, 32 Am. S. R.
239, 17 L. R. A. 339;
Mosteller vs. Iowa Cent. Ry. Co.,
153 Ia. 390, 133 N. W. 748 at 749.

The statements in the leading text books show the rule to be almost universal, and that the Montana decision in the Nelson case is almost without a companion.

5 Ruling Case Law,
Carriers, Sec. 462;
4 Elliott on Railroads,
3rd Ed. Sec. 2334 and 2338;
Mitchie on Carriers,
Section 2085;
3 Hutchinson on Carriers,
Sec. 1608.

The case of Nelson vs. G. N. Ry. Co., 28 Mont. 297, 72 Pac. 642, is contrary to the general rule and does not control in interstate shipments.

However, this matter is not subject to even slightly

varying state decisions, as the shipment was an interstate shipment, for the following cases hold that the question of the burden of proof in interstate matters is a matter of substance and not of procedure and is not a subject of state decision but of general law to be decided by the Federal Courts and that the Federal rule is, in accordance with a whole host of authorities, to the effect that the burden of proof is on the shipper throughout where the caretaker accompanies the shipment:

Berry vs. C. & A. Ry. Co.,
208 S. W. 622 at 623;
Baker vs. Schaff,
211 S. W. 103 to 104;
Bland vs. C. & A. Ry. Co.,
232 S. W. 268;
Neely vs. Hines,
227 S. W. 650;
So. Pac. Ry. Co. vs. Prescott,
240 U. S. 632, 60 L. Ed. 836;
36 Sup. Ct. 469.

Likewise as regards damages due to negligence of the shipper, the burden of proof is on the shipper, to show that the damage was caused by the carrier. Here the greater part of the herd was in the exclusive possession of the shipper and was not again delivered to the railroad at Great Falls until after five days. The present case is an extreme case, for the same reason which required the shipper to prove the condition of animals at the time he delivered them to a railroad, required the shipper to prove the condition of the balance of the herd when he, in effect, redelivered them to the railroad at Great Falls. But in any case, where the shipper accompanies the stock under a contract to look after them, part of the burden

of proving that damage was caused by acts of the carrier requires that the burden of proof shall be on the shipper to show the damage was so caused and not caused by the shipper's own acts. Hence, it was error to give Plaintiffs' Requested Instruction No. 5 (Tr. fol. 558).

From

10 Corpus Juris, p. 328,

we quote:

> "*Burden of Showing Absence of Negligence of Caretaker.* Where by agreement the shipper accompanies the stock for the purpose of taking care of it during transportation, the burden is on him in an action for loss or injury to show that such loss or injury was not due to any negligence on his part in the performance of the duties assumed by him, since he assumes duties as fully and explicitly as does the carrier."

We respectfully submit, therefore, that, as the evidence showed that the animals died or were damaged from an inherent want of vitality however caused, the instructions proposed by the plaintiffs (No. 3, 4, and 5; p. 244 to 246) were inapplicable to the case and were erroneous as placing the burden on the defendant, as was also the plaintiffs' proposed Instruction No. 3 (Tr. p. 244), given by the Court as the Court's Instruction No. 3 placing the burden further on the defendant to show whether the sickness was caused by acts of plaintiffs' caretaker during the transit.

Respectfully submitted,

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